

No. 22664

JUL 19 1968

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IN THE

**United States Court of Appeals  
for the Ninth Circuit**

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WALTER C. GATES, doing business under the firm  
name of GATES CABINETS,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

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**APPELLANT'S REPLY BRIEF**

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FILED

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**APPELLANT'S REPLY BRIEF**

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**I**

**Appellee's Brief Incorrectly States the Issue.**

Taxpayer has not requested the Commissioner to alter a "usual method," but instead, taxpayer has raised the issue as to whether the Commissioner should be required to follow his own Ruling and the common law.

## II

**Appellee has Wrongfully Concluded Appellant's Claim is for Refund From a Particular Account Set Up by Appellee.**

This is not correct. Appellant's claim for refund is for all overpayments of Excise Taxes wrongfully assessed and collected for the period 4-1-60 through 9-30-61 (R. 7-10). There is no dispute that of the \$25,495.06 (R. 70) paid, only \$6,371.52 (R. 70) was legally owed, making the overpayment of the wrongful assessment and collection by the Government herein \$19,123.54. This sum would all be recoverable by appellant except for the Statute of Limitations which the District Court held limited Appellant's recovery of such wrongful assessment and collection to payments made within two years of the date of the filing of claim for refund. There is no dispute that payments totaling \$12,000.00 were made during such two-year period immediately preceding the date of the filing of the claim for refund (R. 70).

The taxpayer is entitled to recover for the amount paid which is in excess of the amount of tax legally due,

*Crocker v. Malley*, Mass., 39 S.Ct. 270, 249 U.S. 223, 63 L. Ed. 573, 2 A.L.R. 1601

*Mennen Co. v. Kelly*, C.C.A.N.J., 137 F.2d 866

*Freeport Texas Co. v. U.S.*, Ct.C1., 58 F.2d 473 supplemented and new trial denied 59 F.2d 1060, certiorari denied 53 S.Ct. 122, 287 U.S. 660, 77 L. Ed. 569



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*Spaid v. U.S.*, D.C.Md., 28 F. Supp. 670, affirmed, C.C.A., *U.S. v. Spaid*, 106 F.2d 315

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*Safe Deposit & Trust Co. of Baltimore v. Tait*, D.C.Md., 8 F. Supp. 634, affirmed, C.C.A., *Tait v. Safe Deposit & Trust Co. of Baltimore*, 78 F.2d 534

*White Motor Co. v. U.S.*, Ct.Cl., 3 F. Supp. 635, certiorari denied *U.S. v. White Motor Co.*, 54 S.Ct. 91, 290 U.S. 672, 78 L. Ed. 580

regardless of whether such overpayment is by the collector's erroneous application of a credit.

*U.S. v. Piedmont Mfg. Co.*, C.C.A.S.C., 89 F.2d 296

*C. I. R. v. McDonald*, C.A.La., 320 F.2d 109

### III

Appellee has Illogically Argued That it is "Usual" for the Commissioner to Wait Until the Statute of Limitations Period is Determined by Taxpayers Filing of a Claim for Refund, and Then Deduct the Full Amount of Tax Legally Due From the Payments Made During a Recoverable Time Period (Br. 5 and 6).

No law is cited to support this argument. Such an argument is contrary to *Rev. Rul. 58-239, 158-1 Cum. Bull. 94* providing that payments made (without reference to statutes of limitations) should be applied first to taxes due, then to penalty and interest due, in that order. Appellee appears to argue that the "usual" method of the Commissioner is to apply payments to taxes not due, if recovery of such illegally assessed taxes is barred by a statute of limitation.

To apply Appellee's cited *Rev. Rul. 58-239, 158-1 Cum. Bull. 94* logically, is also to follow the Common law as to debtor's payments of funds without designation for application, i.e., the funds must be applied to debts actually owed, and subsequent payments in excess of amounts actually owed are overpayments recoverable unless barred by a statute of limitations. This has always been not only logical, but the law upon which Appellee's Ruling is obviously founded.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court erred in not providing that the Commissioner should have applied payments made by Appellant first to taxes legally owed, penalty and interest due, and that subsequent overpayments of \$12,000.00 made within two years prior to filing his claim for refund were recoverable.

Respectfully submitted,

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July, 1968

